92-131

NO. ____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOUGLAS EDWARD BATTI, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the manner in which a traveler in an airport says "no" to a police officer's request to search may form an articulable basis for reasonable suspicion without placing an impermissible burden upon the right to refuse consent.

2. Whether the Court of Appeals' disregard for the factfinding role of the District Court constituted a direct and irreconcilable conflict with binding precedents of this Court governing application of the clearly erroneous standard of review.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Douglas Edward Batti and the respondents United States of America.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOUGLAS EDWARD BATTI, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Douglas E. Batti respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 17, 1992.

OPINION BELOW

The opinion of the Court of Appeals and the order of the District Court of the District of Hawaii granting Defendant's Motion to Suppress appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 17, 1992. A timely petition for rehearing en banc was denied on May 8, 1992, and

this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On February 26, 1991, Douglas Edward Batti arrived at Honolulu International Airport on a Continental Airlines flight from Los Angeles, where he had been for two days. He exited the aircraft at the front of the line and walked briskly from the terminal. DEA agent Joyce Alapa stopped Mr. Batti and asked him where he had been, where he was going, and if she could examine his plane ticket. She noticed that Mr. Batti shifted his weight nervously and that his hand was shaking.

Agent Alapa told Mr. Batti that she was investigating narcotics trafficking, and asked him whether he was carrying narcotics. When he said "no", she asked to search his bag. Mr. Batti refused the request, picked up his bag and clutched it to him. Agent Alapa then informed Mr. Batti that unless he consented to a search, she would detain his bag and put a narcotics detecting dog on it. Without Mr. Batti's consent, she then took the bag to the DEA Task Force Office to wait for the dog. Mr. Batti and Agent Alapa's partner, Agent Ohia, followed. The dog "alerted" to the bag, indicating that the dog smelled narcotics, and Mr. Batti was placed under arrest. Prior to the dog sniff the agents detained the bag about twenty minutes.

Petitioner brought a pre-trial Motion to Suppress in Federal District Court for the District of

Hawaii. The Honorable Samuel P. King heard the motion. The prosecution called as its witnesses the two police officers, Alapa and Ohia. These witnesses were cross-examined by Mr. Batti's counsel. The trial court also questioned the witnesses.

On May 22, 1991, the District Court issued its Order Granting Petitioner's Motion to Suppress. See Appendix at 1a - 5a. The Court concluded that Petitioner and his luggage had been seized by the police, but that neither seizure was supported by a reasonable, articulable suspicion of criminal activity. See Appendix at 4a-5a.

In accordance with its duty under Rule 12(e) of the Federal Rules of Criminal Procedure, the District Court set forth its essential findings of fact in its five page memorandum decision and order. The government appealed from the trial court's order. On appeal, although the government conceded that the District Court's factual findings were to be upheld unless clearly erroneous, the government did not allege that a single specific factual finding of the District Court was unsupported by the evidence.

On March 17, 1992, the Court of Appeals issued its Memorandum decision reversing the District Court's Order Granting Defendant's Motion to Suppress. See Appendix 6a - 10a. The Court of Appeals properly ruled that the District Court's findings of fact were reviewed under the clearly erroneous standard. See Appendix at 7a. The appellate court did not determine that any of the District Court's factual findings were clearly erroneous, but nevertheless reversed the trial court's ultimate conclusion that no reasonable suspicion existed. Petitioner timely filed for rehearing en banc on

April 3, 1992. The Petition for rehearing was denied on May 8, 1992. See Appendix at 11a.

The Court of Appeals made several findings of its own from the cold hearing transcript, significantly modified two central findings of the District Court, and completely disregarded two other important factual findings made by the District Court. See Appendix at 12a - 13a, which is a chart comparing the Court of Appeals' analysis of the factual issues with the District Court's findings of fact.

REASONS FOR GRANTING THE WRIT

I. STRICT ADHERENCE TO CLEARLY ERRONEOUS REVIEW REQUIRES EITHER AFFIRMANCE OR REMAND

This Court has repeatedly and emphatically held that the appellate courts must give due deference to the experience and expertise of the trial court in determining the facts, and not make de novo factual findings.

In Anderson v. Bessemer, 470 U.S. 564, (1985), this Court defined clear error:

> [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum, 333 U.S. 364, 395 (1948).

This Court went on describe when the appellate court must defer to the factual findings of the District Court:

> If the district court's account of the evidence is plausible in light of the record viewed in its

> entirety, the court of appeals may not reverse it even though convinced that it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (Citations omitted).

In Maine v. Taylor, 477 U.S. 131, 144-45 (1986), the Court re-emphasized that the appellate courts are not to engage in factfinding:

> [F]actfinding 'is the basic responsibility of district courts, rather than appellate courts. Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982), quoting, DeMarco v. United States, 415 U.S. 449, 450, n. (1974). As this Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings that they would have made differently. See e.g., Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

Finally, this Court held that special care must be taken by the reviewing court when the fact finder is basing his or her determinations on witness credibility:

> When findings are based upon determinations regarding credibility of witnesses, [the standard] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what was said. See, Wainwright v. Witt, 469 U.S. 412 (1985).

Based upon these holdings, the Court of Appeals had two choices in this case: a) uphold the District Court's findings, or b) reverse them as clearly erroneous.

If the Court of Appeals perceived the District Court's findings to be unclear or insufficient, then it should have remanded the matter to the lower court for more detailed, specific findings. See, DeMarco v. United States, 415 U.S. 449, 450 (1974) United States v. Castrillion, 716 F.2d 1279, 1282-84 (9th Cir. 1983) Wright v. Miller, Federal Practice & Procedure, Section 2577 at 697 and N.93 (1984).

Certiorari should be granted here because rather than defer to the District Court, find clear error, or remand back for more detailed findings, the Court of Appeals "simply expressed disagreement and substituted its own factual findings for those of the District Court." Amadeo v. Zant, 486 U.S. 214, 223 (1987).

II. THE COURT OF APPEALS DID NOT GIVE DUE DEFERENCE TO THE DISTRICT COURT'S FINDINGS WHICH WERE BASED UPON WITNESS CREDIBILITY

Recent case law demonstrates that it does not take many facts to form an articulable basis supporting an experienced police officer's reasonable suspicion when confronting a traveler at an airport. See United States v. Sokolow, 490 U.S. 1, 4 (1989); United States v. Mondello, 927 F.2d 1463, 1470-71 (9th Cir. 1991); United States v. Ayarza, 874 F.2d 647, 651 (9th Cir. 1989). Therefore, it becomes very important when the appellate court changes any of the factual findings of the trial court. In this case, even slight changes in the facts

can make the difference between reasonable suspicion and no reasonable suspicion.

The Court of Appeals found reasonable suspicion upon the following facts:

> The agents' seizure of Batti was supported by reasonable suspicion. Batti arrived in Honolulu after a two-day trip to a drug-source city, Los Angeles. He exited the airplane in a hurry and told Agent Alapa that he was rushing to catch his connecting flight. This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half. Batti also was unable to produce his ticket when asked to do so by Agent Alapa. Furthermore, after being questioned by Alapa, Batti began to act nervous and his hands began to shake. Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body, and stepped a couple of paces away from Alapa.

See Appendix at 9a. Here, instead of deferring to the trial court, the Court of Appeals changed the factual findings to a different conclusion. (See attached chart, Appendix at 12a - 13a.)

First, the District Court made no finding that Batti told the agent he was rushing to catch a connecting flight, yet the Court of Appeals made such a factual finding. The Court of Appeals then went on to find that this explanation was "implausible." The appellate panel's finding of implausibility directly contradicts two trial court findings: a) that nothing was elicited from Mr. Batti

that was unusual or that could lead to the inference of drug possession; and b) that many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stopover periods. See Appendix at 4a.

Furthermore, the appellate panel's finding of implausibility is simply wrong. If the Court of Appeals would not accept the findings of the trial court, then the Court should at least have taken judicial notice of the facts as they exist at Honolulu International Airport.[1] The relevant facts for judicial notice, as presented to the Court

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1. Petitioner requests that the Court take judicial notice of certain facts pursuant to Rule 201 of the Federal Rules of Evidence. Said Rule provides, in pertinent part, that:

> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court...
>
> **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(f) Time of Taking notice.** Judicial notice may be taken at any stage of the proceeding.

Subdivision (f) of the Notes of the Advisory Committee of this rule provides that:

> **Subdivision (f).** In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code Section 459; Kansas Rules of Evidence Section 60-412; New Jersey Evidence Rule 12; McCormick Section 330, p. 712.

of Appeals in Petitioner's timely Petition for Rehearing, are as follows:

1) At the Honolulu International Airport, the interisland carrier flights leave from terminals which are physically separate from the terminal that serves Continental Airlines;

2) The Continental Airlines arrival gate is quite distant from either the Aloha or the Hawaiian Airlines interisland terminals;

3) It is common for residents of Hawaii arriving from the mainland not to be ticketed through to an outer island destination;

4) It is common for residents of Hawaii to separately purchase their tickets for flights from Honolulu to outer islands and such tickets are often purchased in books of coupons or are purchased at the ticket counter just prior to the flight;

5) The interisland carriers request that passengers be present at the terminal one hour prior to departure time even if the passenger has a confirmed reservation; and

6) There are a limited number of interisland flights from Honolulu to Hilo each day.

Given these facts, obviously known to the trial court sitting in Honolulu, the factual version adopted by the appellate panel is not implausible. Rather, it reflects the reality of inter-island air travel in Hawaii.

The Court of Appeals engaged in factfinding regarding Petitioner's airplane ticket in a manner similar to its finding of implausibility. The District Court made no finding of fact that Mr. Batti could not produce his airplane ticket, but the appellate panel made this finding and then considered it among the suspicious things leading to "reasonable suspicion." See Appendix at 7a.

Additionally, the appellate court made significant changes to a crucial finding of the trial court. The trial court made a finding that, when asked if he would consent to a search of his bag, Mr. Batti gave a negative response and picked up his bag and clutched it to him. See Appendix, at 1a - 2a. The appellate panel added to this finding their own more dramatic finding that "he picked up the bag, put his arms through the handles, clutched the bag towards his body and stepped back a couple of paces away from [Agent] Alapa." See Appendix at 9a. (Emphasis added.)

Apparently the appellate court believed that its own factual findings justified more suspicion than did the relatively innocuous facts determined by the trial court after hearing and evaluating the witnesses. Based upon its amended facts, the appellate court held that Mr. Batti's manner of saying "no" was part of the legitimate grounds for police suspicion. See Appendix at 9a.

This case is appropriate for certiorari because of two important flaws with the Court of Appeals holding. First, the appellate panel is not at liberty to change or ignore the facts found by the trial court. Second, this holding creates a whole new area of grounds for suspicion, to wit, the way a person says "no." According to the appellate panel, some ways of saying "no" are more suspicious than others. This holding further restricts the options of travelers when they are confronted by police at airports. It is well known that police use confrontations with travelers at airports as a routine investigative tool. Courts have justified such intrusions by holding that these encounters are consensual, and that people may simply continue on their way or refuse permission to search when asked. Under the holding in this case, even saying "no" may no longer be sufficient to keep the police from taking

one's belongings, if the expression of "no" in some way inflames police suspicion. [2]

The panel's attempt to distinguish numerous ways of saying "no" places an unworkable and impermissible burden on the citizen's right to refuse consent to a police search. This right is difficult enough to assert for a traveling citizen unexpectedly confronted by the police authorities. Holding in effect that "no" expressed in too dramatic a manner invites seizure of one's belongings by police, the Court of Appeals violated reason and our Constitution and reduced the "consensual encounter" theory to a farce. Under such a vitiated standard for refusal of consent, travelers will be subject to detention and their bags subject to seizure either with their consent or because they refuse to consent.

Finally, the appellate panel, in order to reach its result, chose to ignore the trial court's factual findings that Mr. Batti did not meet any drug profile, that his conduct, including his nervousness, was no different from many innocent travelers, and that the Agent's basis to seize and search Mr. Batti's bag was admittedly a "hunch" based on "instinct." See Appendix at 4a.

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2. Because the assertion of "no" by a traveler to a request to search is always seen as suspicious by police officers, it is likely that the "manner" of expressing that "no" will almost always arouse the suspicion of the police, e.g., it is said too quickly, too slowly, too emphatically, too nervously, with gestures, while walking away, while picking up one's belongings, etc.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Dated: June 10, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA Plaintiff V. DOUGLAS EDWARD BATTI, Defendant	Cr. No. 91-00594 DAE

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

On February 26, 1991, Douglas Edward Batti arrived at the Honolulu International Airport on a Continental Airlines flight #003 from Los Angeles where he had been for two days. Upon disembarking at the front of the line from the airplane and walking briskly from the terminal, Mr. Batti was stopped for questioning by DEA Agent Joyce Alapa. Ms. Alapa asked Mr. Batti a few questions regarding where he had been and where he was heading and requested to examine his plane ticket. She noticed that Mr. Batti was nervously shifting his weight from one foot to the other and that his hand were shaking. She advised Mr. Batti that she was investigating narcotics trafficking and asked if he was carrying narcotics. When he responded negatively, Agent Alapa asked if she could look through his bag. Again giving a negative response,

Mr. Batti picked up his bag and clutched it to him. The defendant was then informed that if he did not give the agent permission to conduct the search, that she would detain the bag in order to put a narcotics detecting dog on it. When Mr. Batti told Agent Alapa to put the dog on the bag, she took the bag to the DEA Task Force Office to wait for the dog. Mr. Batti and Agent Alapa's partner, Agent Ohia, followed. The dog "alerted" to the bag indicting that the dog smelled narcotics and Mr. Batti was placed under arrest. The incident of detaining the bag was said to have taken approximately twenty minutes.

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual in a public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Florida v. Royer, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983). However, to determine if a police officer's questioning constitutes an investigative detention, as opposed to a consensual encounter, the applicable standard is whether a reasonable person in the circumstances of the defendant would have believed himself not free to leave. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870 (1980). Mr. Batti acknowledges that he willingly stopped to answer Agent Alapa's questions. It is unclear though whether the defendant felt restricted by Agent Alapa's ensuing interrogation. The record reflects that Agent Alapa singled out Mr. Batti when he disembarked from the plane and caught up to him to ask if he minded being questioned. Once engaged in conversation with the defendant, the agent advised the defendant that she was investigating drug related activities. The entire time Agent Alapa was speaking with Mr. Batti, Agent Ohia was standing ten feet

behind the defendant. When the defendant refused to let Agents Alapa look in his bag, she asked if Agent Ohia could do the inspection. After the defendant's further refusal, Agent Alapa advised him that she would detain the parcel for examination. This court believes that given those particular circumstances a reasonable person in defendant Batti's position would not have felt free to leave. See, United States v. Patino, 649 F.2d 724, 727 (9th Cir. 1981) ("the officers had definitely identified her as a suspect and . . . the manner in which she was stopped conveyed an air of authority indicating that she was not free to leave"); accord, United States v. Palen, 793 F. 2d 853, 857 (7th Cir. 1986) ("the person, once told he is a suspect, no longer feels free to leave the scene of the questioning").

Law enforcement officers are not precluded from effecting an investigative detention, however, a detention and search beyond a routine stop may be undertaken only upon a "reasonable suspicion" justified by a particularized and objective basis for suspecting the particular person of a crime. United States v. Carreon, 872 F.2d 1436, 1440 (10th Cir. 1989). The Supreme Court in Terry v. Ohio. 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968) promulgated the "reasonable suspicion" standard by stating that the detaining officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search or seizure]," in order for the search to be valid. Id. The two-part test announced in Terry to determine whether the less rigorous "reasonable suspicion" standard has been met is as follows. First, the search and seizure must be justified by reasonable suspicion at the inception of the intrusion. Second, the search and seizure must be reasonably related in scope to the circumstances justifying the intrusion in the first instance. Id, 392 U.S. at 20, 88 S.Ct. at 1879. Here,

Agent Alapa did not have reasonable suspicion to confiscate Mr. Batti's carry-on luggage. By Agent Alapa's own admission at the hearing, Mr. Batti did not fit any "drug courier profile." The information that Agent Alapa elicited from Mr. Batti upon questioning was not so unusual that the officers could reasonably infer that the defendant possessed drugs among his personal belongings. Many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stop-over periods. Often these same passengers use luggage belonging to a friend. Furthermore, any reasonable person could be expected to exhibit signs of nervousness when confronted by a police officer for questioning in a public place. Arrival from a "source city" and having little or no luggage are characteristics which "describe a very large category of presumably innocent travelers" and are insufficient to justify a seizure. Reid v. Georgia, 448 U.S. 438, 441 (1980). That defendant Batti manifested all of these characteristics provides no grounds for suspecting wrongdoing. For law enforcement officers to base a search, even in part, on a hunch as Agent Alapa conceded to doing at the hearing, stretches the concept of reasonable suspicion beyond recognition.

It is unfortunate that the defendant, who was actually transporting drugs, should be able to escape the consequences of his illegal activities. However, the need to protect the sanctity of the Constitution's prohibition against unreasonable searches and seizures sometimes occasions inequitable results. Without strict adherence to the letter of the Fourth Amendment, arbitrary, harassing detentions of innocent air travelers could be predicated on mere hunches of law enforcement officers.

The court finds that the detention of Mr. Batti and the seizure of his carry-on luggage were not supported by a

reasonable articulable suspicion. Therefore, any evidence found in the defendant's bag would be deemed fruits of the poisonous tree.

Accordingly, for the foregoing reasons, the defendant's motion to suppress the evidence is hereby GRANTED.

So ordered.

DATED: Honolulu, Hawaii, May 29, 1991.

/s/
SAMUEL P. KING
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellant V. DOUGLAS EDWARD BATTI, Defendant-Appellee	)	No. 91-10318 D.C. No. CR-91-00594-SPK-0 MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Submitted March 11, 1992**

Before: CHOY, FARRIS and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The district court suppressed the heroin found in Batti's bag based on a determination that the seizures of both Batti and his carry-on bag were not supported by a reasonable, articulable suspicion. The government now appeals, arguing first that Batti himself was not seized and, second, that even if Batti were seized, the seizures of both Batti and the carry-on bag were justified by a reasonable suspicion.

While we review the district court's findings of historical facts under the clearly erroneous standard, "the ultimate determination of whether those facts amount to an unlawful seizure is a matter of law that we review de novo." United States v. Johnson, 903 F.2d 1219, 1221 (9th Cir.), cert. denied, 111 S. Ct. 520 (1990); see also United States v. Mines, 883 F.2d 801, 803 (9th Cir.), cert. denied, 493 U.S. 997 (1989). Additionally, review de novo the district court's determination as to whether the law enforcement agents had a reasonable and articulable suspicion to justify a Terry stop. United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989); United States v. Ayarza, 874 F.2d 647, 649-50 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990). We now reverse and remand.

I. Seizure of Batti

The district court found that Batti was seized at some point in the questioning process. To the extent the district court determined that Batti was seized prior to being informed by Agent Alapa that she was either going to search his bag right there in the airport or take it back to the office for a dog sniff, we disagree.

In determining if an officer's actions constituted a seizure, we ask "whether the person stopped reasonably believed that he or she was not free to leave." Johnson,

903 F.2d at 1221. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). The Supreme Court recently reaffirmed that "mere police questioning does not constitute a seizure." Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991).

Under these standards, Batti was not seized prior to being informed that his bag would be either searched or dog sniffed. When Agent Alapa approached Batti, she merely identified herself and asked Batti if she could ask him some questions. Agent Alapa never displayed her weapon, commanded Batti to submit to questioning, or physically restrained Batti. At this point, a person in Batti's position would reasonably have believed that he was free to leave. See generally United States v. Brown, 884 F.2d 1309, 1310-11 (9th Cir. 1989), cert. denied, 493 U.S. 1025 (1990) (no seizure when detectives approached defendant in a public place, did not display weapons, touch defendant, or restrain him in any way, spoke in a non-threatening manner, and told defendant that he was free to go); Ayarza, 874 F.2d at 650-51 (no seizure when trooper approached defendant, identified himself, told defendant that he was free to leave, and then proceeded to question defendant).

The district court further held that, at the point in time when Batti was informed that his bag would be either searched or dog-sniffed, Batti was seized. We need not determine whether a seizure occurred at this point, however, because even if Batti were seized, that seizure was justified by reasonable suspicion.

In determining whether the agent has a reasonable suspicion supported by articulable facts sufficient to justify an investigatory stop, we consider "the totality of the

circumstances - the whole picture." United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). The agents must have "some minimal level of objective justification" for the seizure. Id. at 7 (quoting INS v. Delgado, 466 U.S. 210, 217 (1984)); see also Hernandez-Alvarado, 891 F.2d at 1416.

The agents' seizure of Batti was supported by reasonable suspicion. Batti arrived in Honolulu after a two-day trip to a drug-source city, Los Angeles. He exited the airplane in a hurry and told Agent Alapa that he was rushing to catch his connecting flight. This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half. Batti also was unable to produce his ticket when asked to do so by Agent Alapa. Furthermore, after being questioned by Alapa, Batti began to act nervous and his hands began to shake. Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body, and stepped a couple of paces away from Alapa.

These facts, when viewed "in the light of a trained officer's experience," Hernandez-Alvarado, 891 F.2d at 1416, indicate that Agents Alapa and Ohia had reasonable suspicion to justify an investigative stop of Batti. See generally Sokolow, 490 U.S. at 8-10 (when taken together, evidence of suspect traveling under an alias or taking an evasive path through airport, failing to check luggage, paying cash for tickets, making only a two-day trip to Miami, and acting extremely nervous is sufficient to establish reasonable suspicion); United States v. Low, 887 F.2d 232 (9th Cir. 1989) (that suspect purchased ticket with cash under an alias, appeared nervous, and

failed to check luggage was sufficient to establish reasonable suspicion).

In reaching this conclusion, we are mindful of the Supreme Court's admonition in Reid v. Georgia, 448 U.S. 438, 441 (1980), that reasonable suspicion cannot be based on circumstances or characteristics which "describe a very large category of presumably innocent travelers." When considered as a whole, Batti's conduct was not so consistent with the probable conduct of "a very large category" of innocent travelers as to vitiate the presence of reasonable suspicion.[1]

II. Seizure of Batti's Carry-On Bag

Agent Alapa seized Batti's bag when she informed Batti that she would either search the bag there in the airport or take it to the office for a dog sniff. For the same reasons we determined there was reasonable suspicion to support Batti's seizure, Agent Alapa had a reasonable suspicion to justify this seizure.

REVERSED AND REMANDED

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1. We also realize that Batti should not be penalized for the exercise of his constitutional right not to consent to a search. It was not Batti's refusal to consent to a search, however, that formed the basis for the agents' reasonable suspicion. Rather, it was his rapid exit from the plane, his implausible explanation, his nervousness, and the manner in which he refused consent which properly formed the basis for a reasonable suspicion. See, e.g., United States v. Riley, 927 F.2d 1045, 1050 (8th Cir. 1991) (when determining whether detective had reasonable suspicion, court looked at defendant's "sharp change in attitude" when he withdrew his permission to have his luggage searched.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	No. 91-10318
Plaintiff	)	
	)	
V.	)	D.C. No.
	)	CR-91-00594-
DOUGLAS EDWARD BATTI,	)	SPK-0
	)	
Defendant	)	**ORDER**
	)	

Before: CHOY, FARRIS and RYMER,
Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Farris and Rymer have voted to reject the suggestion for rehearing en banc. Judge Choy so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

KING'S FINDINGS

1. NO FINDING

2. Many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stop-over periods. (Pg. 4)

3. "The information that Agent Alapa elicited from Mr. Batti upon questioning was not so unusual that the officers could reasonably infer that the defendant possessed drugs among his personal belongings." (Pg. 4)

4. NO FINDING

5. "[A]ny reasonable person could be expected to exhibit signs of nervousness when confronted by a police officer for questioning in a public place." (Pg. 4)

6. Alapa asked if she could look through his bag. Again giving a negative response, Mr. Batti picked up his bag and clutched it to him. (Pg. 1)

7. "By Agent Alapa's own admission at the hearing, Mr. Batti did not fit any drug carrier profile." (Pg. 4)

8. "For law enforcement officers to base a search, even in part, on a hunch as Agent Alapa conceded to doing at the hearing, stretches the concept of reasonable suspicion beyond recognition. (Pg. 4)

(NO REASONABLE SUSPICION)

PANEL'S FINDINGS

1. "[Batti] told Agent Alapa that he was rushing to catch his connecting flight." (Pg. 4)

2. "This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half." (Pg. 4)

3. OMITTED

4. "Batti also was unable to produce his ticket when asked to do so by Agent Alapa. (Pg. 4)

5. OMITTED

6. "Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body and stepped back a couple of paces away from Alapa.

7. OMITTED

8. OMITTED

(REASONABLE SUSPICION).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Code, Section 1254(1) states:

> Cases in the courts of appeals may be reviewed by the Supreme court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

The Federal Rules of Criminal Procedure, Rule 12(e) states:

> (e) **Ruling on Motion.** A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

Supreme Court, U.S.
FILED
AUG 11 1992
OFFICE OF THE CLERK

(2)

No. 92-131

In the Supreme Court of the United States

OCTOBER TERM, 1992

DOUGLAS EDWARD BATTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence seized from his bag at an airport.

1. Petitioner was indicted by a grand jury sitting in the United States District Court for the District of Hawaii. He was charged with possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a).

Petitioner moved to suppress evidence seized by government agents from petitioner's carry-on bag at the Honolulu International Airport. The evidence at the suppression hearing showed that a Drug Enforcement Administration agent approached petitioner after he disembarked from an airplane. The

agent identified herself and asked if she could ask petitioner some questions. Petitioner told the agent that he was rushing to catch a connecting flight, but the flight he referred to was not scheduled to leave for an hour and a half, and he was unable to produce his airline ticket. Petitioner became nervous and his hands began to shake. When the agent asked permission to search his bag, petitioner grabbed the bag, clutched it to his body, and stepped backward. The agent then carried the bag to an office for a dog sniff, and the dog alerted to the smell of narcotics. Pet. App. 7a-9a.

On May 29, 1991, the district court suppressed the evidence seized. Pet. App. 1a-5a. The court held that petitioner was seized during the questioning process and that his detention and the seizure of his bag were not supported by reasonable suspicion. *Id.* at 4a-5a.

The court of appeals reversed. Pet. App. 6a-10a. The court ruled that petitioner was not seized during the questioning process, and that there was reasonable suspicion that justified the agent in taking the bag to the office for the dog sniff. The court found reasonable suspicion from petitioner's implausible explanation about hurrying to catch a flight that was not scheduled to leave for an hour and a half, his failure to produce his airline ticket, his nervousness, and the manner in which he clutched the bag. *Id.* at 9a-10a.

2. Petitioner contends (Pet. 4-11) that an agent may not attach significance to the manner in which a suspect refuses consent to a search, and that the court of appeals failed to give due deference to the factual findings of the district court. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the

same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1992

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.